Supreme Court, U.S.
FILED
JUL 16 1992

No. 91-1496

In The

Supreme Court of the United States

October Term, 1992

IN RE: CALIFORNIA MOTOR EXPRESS, INC., DEBTOR

PETER C. REITER AND CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC. MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed February 4, 1992
Writ Of Certiorari Granted On May 18, 1992

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UNITED STATES BANKRUPTCY COURT
PROCEEDING DOCKET

COOPER, Langdon M., Trustee for
CAROLINA MOTOR EXPRESS, INC.

MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs

v.

CALIFORNIA CONSOLIDATED
ENTERPRISES, INC.

Defendants

Collection of unpaid freight bills for freight being transported in interstate commerce pursuant to 49 USC §10741(a), 10761 and 10762

Joseph L. Steinfeld, Jr.
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202-842-1741

Stuart R. Childs
725 East Trade St.
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Langdon M. Cooper
P.O. Box 488
Gastonia, NC 28053

1986		
12/18	1	COMPLAINT/ccc
1987		
1/20	5	ANSWER & Cert. of Service/ rm
1/20	6	MOTION of Deft. that the court permit them to file appropriate pleadings with the Interstate

Commerce Commission, Washington DC for a determination as to whether the charges that are being asserted against the Deft. constitute a reasonable practice/ rm

03/10 9 OPPOSITION
of Pltf. to Deft's motion for referral to Interstate Commerce Commission/ rm

03/20 10 REPLY
of Pltf. to Deft's memorandum of law filed in support of Deft's motion for referral to the Interstate Commerce Commission / rm

03/25 13. ORDER
denying deft's motion for referral to Interstate Commerce Commission. J.E.O. 3-25-87. JUDGMENT BOOK 14, #92 cc: Steinfeld, Cooper, Childs/ rm

03/30 16. MEMORANDUM
of Law of Deft., Carolina Consolidated Enterprises, Inc., in support of the deft's motion for referral to the Interstate Commerce Commission. Cert. of Service/ rm

02/10/88 28. STIPULATED FACTS
of Pltf./ rw

03-17-88 33. FINDINGS OF FACT & CONCLUSIONS OF LAW
/rw (cc: Childs, Cooper, Steinfeld)

03-17-88 34. JUDGMENT
that the Pltf. have and recover from deft. the sum of $58,793.03 for unpaid balance due invoices, plus post-judgment interest at the legal rate from the date of judgment. Pltf. shall also recover from deft.

the sum of $4,804.55 for unpaid original invoices, plus pre judgment interest of $1,423.35, and in addition Pltf. shall recov atty's fees of $2,055.21 for a total sum of $8,283.11 plus post-judgment interest at the rate of $2.00 per day. Pltfs. shall have and recover from Peter Reiter the sum of $13,795.73 for unpaid balance due invoices, plus post-judgment interest at the legal rate of interest. J.E.O. 3-17-88. JUDGMENT BOOK 15, #88. cc: Cooper, Steinfeld, Childs/ rw

03-28-88 35. NOTICE OF APPEAL
of deft. California Consolidated Enterprises, Inc. to final judgment entered on 3-17-88. Cert. of Service/ rw

04-07-88 36. NOTICE OF CROSS-APPEAL TO DISTRICT COURT
filed by Langdon Cooper, Trustee. Cert. of Service/ rw

04-07-88 37. STATEMENT OF ISSUES UPON APPEAL
of Calif. Consolidated defendants. Cert. of service/ rw

06-10-88 45. MOTION
of California Consoliated [sic] for a stay in the proceedings pending the decision in docket No. MC-C-30090, National Industrial Transportation League – Petition for Declaratory Order on Motion Common Carrier Negotiated Rates. Memorandum of Law. Cert. of Service/ rw

03/19/92 03/20/92	46.	MEMORANDUM of DECISION of United States Senior District Court Judge, Woodrow W. Jones/ rm
03/19/92 03/20/92	47.	JUDGMENT of United States Senior District Court Judge, Woodrow W. Jones that the judgment of the bankruptcy court is reinstated in accordance with the instruction of the Fourth Circuit Court of Appeals; Deft's motion to hold in abeyance Pltfs' motion for reinstatement of judgment and award of interest and atty's fees is DENIED; pltf's motion for entry of judgment and award of interest and atty's fees is granted; bankruptcy's court's denial of pltfs' request for late payment charges and attys' fees pursuant to ICC CAXN 101 Item 435 of the debtor's tariff is overruled; and, Judgment is granted in favor of pltfs in the principal amount of $58,793.03, late payment charges of $53,648.67, and attys fees in the amount of $37,443.07, for a total judgment of $149,884.77. Judgment Book #19, #96. Served in District Court/ rw

UNITED STATES BANKRUPTCY COURT
PROCEEDING DOCKET

COOPER, Langdon M., Trustee for
CAROLINA MOTOR EXPRESS, INC.

MARK & ASSOCIATES OF
NORTH CAROLINA, INC. Plaintiffs

v.

REITER, Peter C.

Defendants

Collection of unpaid freight bills for freight being transported in interstate commerce pursuant to 49 USC §s 10741(a), 10761 and 10762

Joseph L. Steinfeld, Jr.
1275 K St., NW, #875
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1987

01/29	1	COMPLAINT/ccc
02/27	5	ANSWER Cert. of Service/ rm
03/19	8	MEMORANDUM of Law of Deft., Peter C. Reiter, in support of the deft's motion for referral to the Interstate Commerce Commission. Cert. of Service/ rm
03/25	11	ORDER denying deft's motion for referral to Interstate Commerce Commission. J.E.O. 3-25-87. JUDGMENT BOOK 14, #93. cc: Childs, Steinfeld, Cooper/ rm

02-11-88 25. STIPULATED FACTS
of Pltf./ rw

02-11-88 26. TRIAL BRIEF
of Pltf./ rw

02-12-88 27. TRIAL BRIEF
of Deft./ rw (original in file #86-0498)/ rw

02-16-88 28. COURT TRIAL
Judgment for Pltf. - Steinfeld to draw proposed order - Childs & Gallagher have 7 days to respond/ rw

03-17-88 30. FINDINGS OF FACT & CONCLUSIONS OF LAW.
cc: Childs, Steinfeld, Cooper/ rw

03-17-88 31. JUDGMENT
03-17-88 that Pltfs' have and recover of deft., California Consolidated the sum of $58,793.03 for unpaid balance due invoices, plus post judgment interest at the legal rate from date of judgment; Pltf's shall also have & recover from California consolidated the sum of $4,804.55 for unpaid original invoices plus pre judgment interest of $1,423.35 and $2,055.21 representing atty's fees for a total sum of $8,283.11 plus post-judgment interest at the rate of $2.00 per day. Pltfs' shall have & recover from deft., Peter C. Reiter the sum of $13,795.73 for unpaid balance due invoices, plus post-judgment interest at the legal rate of interest. J.E.O. 3-17-88. JUDGMENT BOOK 15, #88.
cc: Steinfeld, Cooper, Childs/ rw

03-28-88 32. NOTICE OF APPEAL
of deft., Peter C. Reiter of final judgment entered on 3-17-88. Cert. of Service/ rw

04-07-88 33. NOTICE OF CROSS-APPEAL
filed by Langdon M. Cooper, Trustee. Cert. of Service/ rw

06-10-88 42. MOTION
of Peter C. Reiter for a stay in the proceedings pending the decision in Docket No. MC-C-30090, National Industrial Transportation League - Petition for Declaratory Order on Motor Common Carrier Negotiated Rates. Memorandum of Law. Cert. of Service/ rw

03/19/92 44. MEMORANDUM OF DECISION
03/20/92 of United States Senior District Judge, Woodrow W. Jones/ rw

03/19/92 45. JUDGMENT
03/20/92 of United States Senior District Judge, Woodrow W. Jones that the judgment of the Bankruptcy Court is reinstated in accordance with the instructions of the Fourth Circuit Court of Appeal Deft's Motion to Hold in Abeyance Pltfs' Motion for reinstatement of judgment and award of interest and Atty's fees is denied; Pltfs' motion for entry of judgment and award of interest and atty's fees is granted; the bankruptcy's court's denial of pltfs' request for late payment charges and attys' fees pursuant to ICC CAXN 101 Item 435 of the debtor's tariff is overruled, and, Judgment is granted in favor of pltfs in the principal amount of $13,795.73, late payment charges of $12,071.26 and attys fees in the amount

of $8,613.71 for a total judgment of $34,480.70. Served in district court. Judgment book #19, #94./ rw

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UNITED STATES DISTRICT COURT DOCKET

Cooper, Langdon M., Trustee for
Carolina Motor Express, Inc.

Mark & Associated of North Carolina Inc.

Plaintiffs

v.

Reiter, Peter C.

Defendants

Adversary Case #87-0028

Appeal to the district court from the bankruptcy court decision./CROSS APPEAL

BY: Joseph L. Steinfeld, Jr.
1275 K St., NW, #875
Washington, DC 20005
202/ 842-1741

BY: Stuart R. Childs
725 East Trade St.
Charlotte, N.C. 28202
704/ 377-2086

BY: Langdon M. Cooper
P.O. Box 488
Gastonia, NC 28053
704/ 864-6751
FOR: Carolina Motor Express, Inc.

1989

04-25 9 Memorandum of Decision. Copies mailed to Attys. of record.

04-25 10 JUDGMENT ORDERED that the judgment of the Bankruptcy Court in this cause be and the same is hereby reversed and the issue of whether under the facts of this case it would be an unreasonable practice for the deft. to be required to pay the undercharge claims advanced by the Pltfs. is referred to the Interstate Commerce Commission for consideration. IT IS FURTHER ORDERED that the Deft. take the necessary steps to bring this matter before the Interstate Commerce Commission within twenty-one (21) days of the filing date of this judgment, and the attorneys for the parties shall report to this Court the status of the case each three (3) months until the Commission renderes [sic] its decision. IT IS FURTHER ORDERED that further proceedings in this Court be stayed pending the decision of the Commission. Copies mailed to Attys. of record. (Order by W. W. Jones)
ORDER AND JUDGMENT DOCKET XXXXII, NO. 87.

UNITED STATES DISTRICT COURT DOCKET
SHELBY DIVISION

Cooper, Langdon M., Trustee for
Carolina Motor Express, Inc.

Mark & Associated of North Carolina Inc.

Plaintiffs

v.

California Consolidated Enterprises, Inc.

Defendants

Adversary Case #86-0498

Appeal to the district court from the bankruptcy court decision.

BY: Langdon M. Cooper
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Gastonia, NC 28053
704/ 864-6751
FOR: Carolina Motor Express, Inc.

BY: Robert J. Gallagher
17 New South St.
Northampton, MA 01060
PH: 413-586-1994
&

BY: Joseph L. Steinfeld, Jr.
1275 K St., NW, #875
Washington, DC 20005
202/ 842-1741
FOR: Mark & Associated of NC, Inc.

BY: Stuart R. Childs
725 E. Trade St.
Charlotte, N.C. 28202
FOR: California Consolidated Enterprises, Inc.

1989

04-25 10 Memorandum of Decision. Copies mailed to Attys. of record.

04-25 11 JUDGMENT ORDERED that the judgment of the Bankruptcy Court in .this cause be and the same is hereby reversed

and the issue of whether under the facts of this case it would be an unreasonable practice for the deft. to be required to pay the undercharge claims advanced by the Pltfs. is referred to the Interstate Commerce Commission for consideration. IT IS FURTHER ORDERED that the Deft. take the necessary steps to bring this matter before the Interstate Commerce Commission within twenty-one (21) days of the filing date of this judgment, and the attorneys for the parties shall report to this Court the status of the case each three (3) months until the Commission renders its decision. IT IS FURTHER ORDERED that further proceedings in this Court be stayed pending the decision of the Commission. Copies mailed to Attys. of record. (rej) (Order by W. W. Jones)
ORDER AND JUDGMENT DOCKET XXXXII, NO. 86.

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LANGDON M. COOPER, Trustee for
Carolina Motor Express, Inc.;
MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs-Appellants

v.

CALIFORNIA CONSOLIDATED
ENTERPRISES, INC.

Defendant-Appellee

7/27/90	Letter addressing effect of Supreme Court decision in Maislin Industries filed by Appellant Mark Associates NC in 89-3259, Appellant Langdon M. Cooper in 89-3261, Appellant Mark Associates NC in 89-3261, Appellant Langdon M. Cooper in 89-3261, Appellant Mark Associates NC in 89-3262, Appellant Langdon M. Cooper in 89-3262 [1387067-1] [89-3259, 89-3261, 89-3262] (dad) [89-3259 89-3261 89-3262]
7/27/90	Letter addressing Supreme Court decision in Maislin filed by Appellee Delaware Valley Ship in 89-3259 [1387074-1] [89-3259] (dad) [89-3259]
7/30/90	Letter filed by Appellee Peter C. Reiter in 89-3261, appellee California Cons addressing the Supreme Court's decision in Maislin Ind. v. Primary Steel, Inc. 89-3262 [1387913-1] [89-3261, 89-3262] (yj) [89-3261 89-3262]

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LANGDON M. COOPER, Trustee for
Carolina Motor Express, Inc.;
MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs-Appellants

v.

PETER C. REITER

Defendant-Appellee

7/30/90	Letter filed by Appellee Peter C. Reiter in 89-3261, Appellee California Cons addressing the Supreme Court's decision in Maislin Ind. v. Primary Steel, Inc. 89-3262 [1387913-1] 89-3261, 89-3262] (yj) [89-3261 89-3262]

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D. No.: 56-1299892	)	Case No. SH-B-86-00226 (Chapter 7)
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498 COMPLAINT to recover freight charges (Filed Dec. 18, 1986)

The Plaintiffs, Langdon M. Cooper, Trustee in bankruptcy for Carolina Motor Express, Inc., (hereinafter called "Trustee") and Mark & Associates of North Carolina, Inc. (hereinafter called "Mark") complaining of the Defendant, California Consolidated Enterprises, Inc., alleges and says that:

Parties and Jurisdiction

1. The Trustee, a resident of Gaston County, North Carolina is the duly appointed, qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor) having been so appointed by this Court on November 7, 1986, an order for relief under Chapter 11 of Title 11 in the United States Bankruptcy Code (the "Code") having been entered by this Court on May 2, 1986, and approval of conversion of this case to a Petition for Relief under Chapter 7 having been approved by this Court on November 22, 1986.

2. Mark is a North Carolina corporation which was hired by the Debtor pursuant to a contract approved by this Court on July 15, 1986, to audit the Debtor's freight bills, and if the bills were found to be undercharged to rebill the same and collect the balance due charges. As part of said contract, Mark is authorized to commence litigation to collect the balance due invoices in the name of the Debtor and through counsel of its choice.

3. The Defendant, California Consolidated Enterprises, Inc. is a corporation organized under the laws of California with its principal place of business at 14704 Radburn Avenue, Santa Fe Springs, California 90670.

4. This is an adversary proceeding under Bankruptcy Rule 7001(1) related to the above-referenced bankruptcy case now pending before this Court, and in this adversary proceeding, the Plaintiffs seek to recover money owed by the Defendant to the Debtor for failure to fully pay for services rendered by the Debtor to the Defendant as is more particularly described below.

5. This Court has jurisdication [sic] over this action pursuant to 28 U.S.C. Section 1334 because this is a proceeding arising under Title 11 or arising in or related to a case under Title 11, and because it involves enforcement of rights granted by the United States Bankruptcy Code, and because of the order entered by the judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the "Referral Order") pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984 referring to this Court all core proceedings arising under Title 11, or arising in a case under Title 11, and all proceedings that are not core proceedings, but that are otherwise related to a case under Title 11.

6. Further, this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Section 1334, 28 U.S.C. Section 157(b)(2), and the "Referral Order," because this is a core proceeding as defined in 28 U.S.C. Section 157(b)(2)(o) in that it concerns the recovery of monies owed to the estate and thus will directly effect the liquidation of assets of the estate.

Facts

7. The Debtor was, at all times hereafter mentioned, a motor common carrier operating in interstate commerce pursuant to authority issued by the Interstate Commerce Commission (ICC).

8. The Defendant tendered freight to the Debtor for transportation in interstate commerce. The Debtor accepted such freight and performed the transportation services pursuant to the authority issued to the Debtor by the ICC and subject to the tariff rates and rules provisions the Debtor had filed with the ICC at the time the shipments were handled.

9. Pursuant to 49 U.S.C. Section 10761(a), the Debtor must charge and the Defendant must pay as compensation for the transportation services performed by the Debtor the rate specified in the Debtor's duly filed tariffs.

10. Pursuant to the aforementioned freight bill audit contract entered into between the Debtor and Mark, Mark audited all of the shipments handled by the Debtor for Defendant by comparing the commodities, weights, points of origin, destination, and declared value of each shipment to the applicable tariff rate and rules provisions that the Debtor had on file with the ICC, and which were effective at the date of the shipment. The result of said audit was the creation of balance due invoices in the total amount of $58,651.83. Copies of invoices evidencing this debt are attached hereto, marked Exhibit A and are incorporated herein by reference.

11. In addition to the balance due invoices referred to in paragraph 9, Defendant owes the Debtor $24,201.90 for previously billed but unpaid invoices, resulting in a total debtor to the Debtor of $82,853.73. Copies of invoices evidencing this debt are attached hereto, marked Exhibit B, and are incorporated herein by reference. The Debtor has made repeated demands upon the Defendant for the payment of $82,853.73, but the Defendant refused to pay said sum and $82,853.73 remains unpaid.

12. Pursuant to the provisions of the Debtor's tariff filed with the ICC under ICC CAXN 101, Item No. 435, Plaintiffs are entitled to recover from Defendant a late payment charge at the rate of 1.5% per month on the outstanding balance due the Debtor from Defendant, plus attorney's fees and expenses computed at 33% of the transportation and late payment charges due on the Debtor's freight bills. A copy of this tariff

provision is attached hereto as Exhibit C and incorporated herein by reference.

WHEREFORE, the Plaintiffs respectfully pray the Court for the following relief:

1. That the Plaintiffs have and recover of the Defendant the sum of $82,853.73.

2. That the Plaintiffs have and recover of the Defendant the late payment charges calculated at 1.5% per month of the outstanding balance due the Debtor from the date said invoices were submitted to Defendant for payment.

3. That the Plaintiffs have and recover of the Defendant attorney's fees computed at 33% of the outstanding invoices, plus late charges due the Debtor.

4. That the Plaintiffs have and recover of the Defendant the costs of this action.

5. For such other and further relief as the Court deems just and proper.

This the 18th day of December, 1986.

/s/ Langdon M. Cooper
LANGDON M. COOPER, Trustee

By: /s/ Langdon M. Cooper
Langdon M. Cooper
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By: /s/ Joseph L. Steinfeld, Jr.
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(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

IN RE:	)	Case No.
CAROLINA MOTOR EXPRESS, INC.	)	SH-B-86-00226 (Chapter 7)
I.D. No.: 56-1299892	)	
	)	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC.	)	Adversary Proceeding No. 87-0028
and	)	
MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs,	)	COMPLAINT to recover freight charges
v.	)	
PETER C. REITER, Defendant.	)	(Filed Jan. 29, 1987)

The Plaintiffs, Langdon M. Cooper, Trustee in bankruptcy for Carolina Motor Express, Inc., (hereinafter called "Trustee") and Mark & Associates of N h Carolina, Inc. (hereinafter called "Mark") complaining of the Defendant, Peter C. Reiter (hereinafter called "Reiter") alleges and says that:

Parties and Jurisdiction

1. The Trustee, a resident of Gaston County, North Carolina is the duly appointed, qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor) having been so appointed by this Court on November 7, 1986, an order for relief under Chapter 11 of Title 11 in the United States Bankruptcy Code (the "Code") having been entered by this Court on May 2, 1986, and approval of conversion of this case to a Petition for Relief under Chapter 7 having been approved by this Court on November 22, 1986.

2. Mark is a North Carolina corporation which was hired by the Debtor pursuant to a contract approved by this Court on July 15, 1986, to audit the Debtor's freight bills, and if the bills were found to be undercharged to rebill the same and collect the balance due charges. As part of said contract, Mark is authorized to commence litigation to collect the balance due invoices in the name of the Debtor and through counsel of its choice.

3. The Defendant Reiter is a sole proprietor doing business as a transportation broker licensed by the Interstate Commerce Commission with its principal place of business at 10424 Parakeet Circle, Fountain Valley, California 92708.

4. This is an adversary proceeding under Bankruptcy Rule 7001(1) related to the above-referenced bankruptcy case now pending before this Court, and in this adversary proceeding, the Plaintiffs seek to recover money owed by the Defendant to the Debtor for failure to fully pay for services rendered by the Debtor to the Defendant as is more particularly described below.

5. This Court has jurisdication [sic] over this action pursuant to 28 U.S.C. Section 1334 because this is a proceeding arising under Title 11 or arising in or related to a case under Title 11, and because it involves enforcement of rights granted by the United States Bankruptcy Code, and because of the order entered by the judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the "Referral Order") pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984 referring to this Court all core proceedings arising under Title 11, or arising in a case under Title 11, and all proceedings that are not core proceedings, but that are otherwise related to a case under Title 11.

6. Further, this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Section 1334, 28 U.S.C. Section 157(b)(2), and the "Referral Order," because this is a core proceeding as defined in 28 U.S.C. Section 157(b)(2)(o) in that it concerns the recovery of monies owed to the estate and thus will directly effect the liquidation of assets of the estate.

Facts

7. The Debtor was, at all times hereafter mentioned, a motor common carrier operating in interstate commerce pursuant to authority issued by the Interstate Commerce Commission (ICC).

8. The Defendant tendered freight to the Debtor for transportation in interstate commerce. The Debtor accepted such freight and performed the transportation services pursuant to the authority issued to the Debtor by the ICC and subject to the tariff rates and rules provisions the Debtor had filed with the ICC at the time the shipments were handled.

9. Pursuant to 49 U.S.C. Section 10761(a), the Debtor must charge and the Defendant must pay as compensation for the transportation services performed by the Debtor the rate specified in the Debtor's duly filed tariffs.

10. Pursuant to the aforementioned freight bill audit contract entered into between the Debtor and Mark, Mark audited all of the shipments handled by the Debtor for Defendant by comparing the commodities, weights, points of origin, destination, and declared value of each shipment to the applicable tariff rate and rules provisions that the Debtor had on file with the ICC, and which were effective at the date of the shipment. The result of said audit was the creation of balance due invoices in the total amount of $13,408.31. Copies of invoices evidencing this debt are attached hereto, marked Exhibit A and are incorporated herein by reference.

11. The Debtor has made demand upon the Defendant for the payment of $13,408.31, but the Defendant refused to pay said sum and $13,408.31 remains unpaid.

12. Pursuant to the provisions of the Debtor's tariff filed with the ICC under ICC CAXN 101, Item No. 435, Plaintiffs are entitled to recover from Defendant a late payment charge at the rate of 1.25% per month on the outstanding balance due the Debtor from 15 days after the date of original billing of Defendant, plus attorney's fees and expenses computed at 33% of the transportation and late payment charges due on the Debtor's freight bills. A copy of this tariff provision is attached hereto as Exhibit B and incorporated herein by reference.

WHEREFORE, the Plaintiffs respectfully pray the Court for the following relief:

1. That the Plaintiffs have and recover of the Defendant the sum of $13,408.31.

2. That the Plaintiffs have and recover of the Defendant the late payment charges calculated at 1.25% per month of the outstanding balance due the Debtor from 15 days after the original date the bills were submitted to Defendant for payment.

3. That the Plaintiffs have and recover of the Defendant attorney's fees computed at 33% of the outstanding invoices, plus late charges due the Debtor.

4. That the Plaintiffs have and recover of the Defendant the costs of this action.

5. For such other and further relief as the Court deems just and proper.

This the 26th day of January, 1987.

/s/ Langdon M. Cooper
LANGDON M. COOPER, Trustee

By: /s/ Langdon M. Cooper
Langdon M. Cooper
MULLEN, HOLLAND
& COOPER, P.A.
Attorneys for the Trustee
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By: /s/ Joseph L. Steinfeld, Jr.
Joseph L. Steinfeld, Jr.
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(Exhibits Omitted In Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D.No.: 56-1299892	)	Case No. SH-B-86-00226 (Chapter 7)
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC., Plaintiffs,	)	ADVERSARY PROCEEDING NUMBER 86-0498
v.	)	ANSWER (Filed Jan. 20, 1987)
CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	

The Defendant in the above-described proceeding, CALIFORNIA CONSOLIDATED ENTERPRISES, INC., does hereby answer the Complaint of the Plaintiffs, as follows:

1. The allegations of Paragraph 1 are admitted upon information and belief.

2. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 2, and they are, therefore, denied.

3. The allegations of Paragraph 3 are admitted.

4. It is admitted that this is an adversary proceeding, and that the Plaintiffs seek to recover money from the Defendant; but, the Defendant denies that it has failed to fully pay for the Debtor's services, except as it may admit otherwise in its answer to Paragraph 11 hereinafter.

5. The allegations of Paragraph 5 are admitted upon information and belief.

6. The allegations of Paragraph 6 are admitted upon information and belief.

7. The Defendant is without sufficient information upon which to form a belief as to the allegations of Paragraph 7, and they are, therefore, denied.

8. The Defendant admits that it tendered freight to the Debtor, that the Debtor accepted such freight, and transported the freight in interstate commerce. The Defendant is without sufficient information to form a belief as to the other allegations of Paragraph 8, and they are, therefore, denied.

9. The allegations of Paragraph 9 are denied.

10. The allegations of Paragraph 10 are denied.

11. The Defendant acknowledges that it owes the Plaintiffs some portion of the $24,201.90 previously billed but unpaid invoices, as that amount will be reduced by some $7,000.00 to $8,000.00 in claims filed with the Plaintiff, but not acknowledged in any way by the plaintiff; and, as that amount may be further reduced by other claims presented at trial time. The other allegations of Paragraph 11 are denied.

12. The allegations of Paragraph 12 are denied.

FIRST DEFENSE

Pursuant to Section 7012 of the Rules of Bankruptcy Procedure and Rule 12(b) of the Federal Rules of Civil Procedure, the Defendant respectfully moves the Court to dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., for the reason that it has no relationship with the Defendant which would make the Defendant liable to it upon any ground. Mark's contract is with the other Plaintiff, not this Defendant.

SECOND DEFENSE

1. From the beginning of the business relationship between the Plaintiff-Carrier and the Defendant, the Plaintiff-Carrier held itself out and was dealt with by the Defendant as a contract carrier. The Carrier repeatedly assured the Defendant that it had both contract and common carrier authority on file with the Inter-state Commerce Commission. The Defendant repeatedly asked the Carrier for a copy of its contract authority but it was never produced.

2. If the Plaintiff-Carrier held contract carrier authority, as it repeatedly assured the Defendant that it did, and rates satisfactory to the Plaintiff-Carrier and the Defendant were agreed upon, as reflected by Exhibit A attached hereto, then the fact that the Plaintiff-Carrier acted also as a common carrier, and published its tariff as required by 49 USC §10761 would not detract from the reasonableness or appropriateness of the contract carrier rates agreed upon by the Plaintiff-Carrier and the Defendant.

THIRD DEFENSE

The Plaintiff-Carrier in Exhibit A attached hereto – the cover letter and the "Confirmation of Rates" attached thereto – indicated to the Defendant that the Plaintiff-Carrier has the authority to transport the Defendant's freight to the points indicated and at the rates stated; the Defendant accepted the offer so stated; and, the Defendant relied upon the Plaintiff-Carrier's representation that it had published or would publish the rates agreed upon, and had the authority to transport the Defendant's freight at those rates, reliance which now works to the gross detriment of the Defendant, if the collection of the alleged undercharge is allowed.

FOURTH DEFENSE

At no time prior to this suit by the Bankruptcy Trustee was the Defendant notified of the late payment charge of 1.5% (stated as 1.25% in Plaintiff-Carrier's Exhibit C), the arbitrary insurance charge of 3.5% added to the Plaintiff-Carrier's revised invoices, or the 33% attorney fees and expenses – all referred to in Paragraph 12 of the Complaint. Such charges are unreasonable and without foundation.

WHEREFORE, the Defendant prays that the Court:

1. Dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., as a party plaintiff to this action.

2. Dismiss the Plaintiff-Carrier's action as it pertains to the collection of the alleged undercharges and penalties related thereto.

3. Allow so much of the claim as relates to the previously billed but unpaid invoices of the Plaintiff-Carrier, as that amount may be reduced by such loss claims and related costs as may properly be supported by the Defendant in this action.

4. Tax the costs of this action against the Plaintiff-Carrier.

5. Grant such other relief as may be appropriate.

This 20th day of January, 1987.

/s/ Stuart R. Childs
Stuart R. Childs
Attorney for the Defendant
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Charlotte, North Carolina
28202
Telephone 704/377-2086

(Certificate of Service Omitted in Printing)

(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE:	Case No.
CAROLINA MOTOR EXPRESS, INC.	SH-B-86-00226 (Chapter 7)
I.D.No.: 56-1299892	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC., Plaintiffs,	ADVERSARY PROCEEDING NUMBER 87-0028
v.	ANSWER
PETER C. REITER, Defendant.	(Filed Feb. 27, 1987)

The Defendant in the above-described proceeding, PETER C. REITER, does hereby answer the Complaint of the Plaintiffs, as follows:

1. The allegations of Paragraph 1 are admitted upon information and belief.

2. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 2, and they are, therefore, denied.

3. The allegations of Paragraph 3 are admitted.

4. It is admitted that this is an adversary proceeding, and that the Plaintiffs seek to recover money from the Defendant; but, the Defendant denies that he has failed to fully pay for the Debtor's services.

5. The allegations of Paragraph 5 are admitted upon information and belief.

6. The allegations of Paragraph 6 are admitted upon information and belief.

7. The Defendant is without sufficient information upon which to form a belief as to the allegations of Paragraph 7, and they are, therefore, denied.

8. The Defendant admits that he tendered freight to the Debtor, that the Debtor accepted such freight, and transported the freight in interstate commerce. The Defendant is without sufficient information to form a belief as to the other allegations of Paragraph 8, and they are, therefore, denied.

9. The allegations of Paragraph 9 are denied.

10. The allegations of Paragraph 10 are denied.

11. The Defendant denies that payment in any amount is due from the Defendant to the Plaintiff, and admits that demand has been made and the Defendant has refused to pay more than was originally agreed upon by the Plaintiff and the Defendant.

12. The allegations of Paragraph 12 are denied.

FIRST DEFENSE

Pursuant to Section 7012 of the Rules of Bankruptcy Procedure, and Rule 12(b) of the Federal Rules of Civil Procedure, the Defendant respectfully moves the Court to dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., for the reason that it has no relationship with the Defendant which would make the Defendant liable to it upon any ground. Mark's contract is with the other Plaintiff, not this Defendant.

SECOND DEFENSE

1. The Debtor-Carrier contacted the Defendant in December of 1984, offering its transportation services to the Defendant. The Defendant indicated that the parties could do business together; however, the Defendant requested of the Debtor-Carrier that it furnish him with a copy of its tariff in order that an agreed upon basis be established for conducting business. In Defendant's Exhibit A attached hereto, the Debtor-Carrier failed to furnish the Defendant with a copy of the tariff, stating: "The tariff is voluminous and we will handle anything that pays over $.90 per mile."

2. From December 20, 1984, the date of Exhibit A attached hereto, the salesmen, dispatchers, and officers of the Debtor-Carrier continually contacted the Defendant requesting that as much freight be handled by the Defendant through the Debtor-Carrier upon the basis established by Exhibit A as possible, and this pressure for more business continued on the Defendant right up to the time the Debtor-Carrier filed in bankruptcy.

3. The Trustee in Bankruptcy has no right now unilaterally to create a new contract between the Debtor-Carrier and the Defendant.

THIRD DEFENSE

The Defendant dealt in good faith with the Debtor-Carrier based upon the criteria in Exhibit A hereto; if the Debtor-Carrier failed properly to publish its rates; or, charged an improper rate; the Debtor-Carrier was negligent by not so informing the Defendant.

FOURTH DEFENSE

Neither the insurance arbitrary charges, the penalties sued for in the complaint, some of the freight bills attached to the Complaint, nor the alleged undercharges, were made known to the Defendant prior to this Bankruptcy action and should, therefore, not be allowed by this Court.

WHEREFORE, the Defendant prays that the Court:

1. Dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., as a party plaintiff to this action.

2. Dismiss the Debtor-Carrier's action as it pertains to the collection of the alleged undercharges and penalties.

3. Issue judgement in favor of the Defendant against the Plaintiffs that the Plaintiffs recover nothing of this Defendant, and that the costs of this action be taxed against the Plaintiffs.

4. That the Court grant the Defendant such other relief as may be appropriate.

This 25th day of February, 1987.

/s/ Stuart R. Childs
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(Certificate of Service Omitted in Printing)

(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE:	
CAROLINA MOTOR EXPRESS, INC.	Case No. SH-B-86-00226
I.D. No.: 56-1299892	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC.	
and	
MARK & ASSOCIATES OF NORTH CAROLINA, INC.	Adversary Proceeding No. 86-0498
Plaintiffs,	
v.	
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

The defendant, Carolina Consolidated Enterprises, Inc. files this memorandum in support of its above-named motion.

SUMMARY OF ARGUMENT

It is the primary and exclusive right of the Interstate Commerce Commission to determine whether rates and tariff provisions are lawful. The defendant, therefore, argues that the question of the reasonableness and lawfulness of the rates involved in this proceeding should be referred to the Commission. To do otherwise results in a wasteful and duplicative effort by a court and an administrative agency.

STATEMENT OF THE FACTS

The debtor came to the defendant and stated, in writing (see Appendix "A")

> "Please find enclosed an Insurance Certificate, a copy of our operating authority, and a list of states to which we can confirm your rate of $.90 per mile on straight loads and $.95 per mile via route of movement, plus $30.00 per stop on stop-loads."

After the debtor went bankrupt, the defendant was confronted with a claim for much higher charges, coupled with an assertion that *these* were the lawful charges of the carrier.

It is these charges that the defendant disputes, on its contention that these charges are not lawful.

LAW AND ARGUMENT

The first matter that should be addressed is the difference between a legal rate and a lawful rate. The Supreme Court said in ARIZONA Grocery Co. v.

Atchison, Topeka & Santa Fe Ry. Co, 284 U.S. 370, (1931) at page 384

> "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the **legal** rates, that is, those which must be charged to all shippers alike.
>
> Although the Act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burdon of conforming its charges to that standard. In other words, the legal rate was not made by the statute of lawful rate, – it was lawful only if it was reasonable.
>
> The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of published rate." (footnotes omitted)

Thus, whether rates are reasonable, and thus lawful, is to be determined by the Commission.

A shipper has a right to file a complaint, at any time, challenging the reasonableness of a motor carrier rate or practice 49 U.S.C. Sec. 10701(a) and 10704(b).

The Commission can find that it would be an unreasonable practice for a carrier to collect under charges, *Seaboard System Railroad, Inc.* v. U.S. 794 F. 2d 635 (11th Cir. 1986), (Appendix "B" attached).

As the Court said, at page 638

"The Commission acknowledged in its order that it too historically has refused to order the waiver of undercharges based on carrier rate misquotations, because granting such relief might lead to intentional "misquotations" by carriers seeking to discriminate in favour of particular shippers. Nonetheless, the courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges. In none of the cases cited above had there been a waiver of undercharges by the Commission. As the Commission stated, finding a carrier practice unreasonable is kind of determination that lies in the primary jurisdiction of the Commission. **See Nader v. Allegheny Airlines, Inc.,** 426 U.S. 290, 304-05, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976).

In addition to the question of the misrepresentation of the rates, the Commission would also be asked to determine the lawfulness of the interest charges and the provision for attorneys fees. *Seaboard* supra supports the referral of such matters to the Commission for it's determination of the tariff rates, and that the proceeding be held in abeyance pending the determination of these issues.

Further, the defendant has raised the issue that the goods moved for, at least some of the time, under the debtors contract carriage authority, and that, too, would be proper matter for the Commission to determine.

If the Court does not refer the matter to the Commission, the defendant will file a complaint with the Commission, challenging the reasonableness and lawfulness

of the Debtor's rates and practices. This will result in two tribunals expending valuable time on the same items.

It appears more logical and reasonable to refer it to the Commission and thus prevent an unneccessary [sic] duplication of effort.

CONCLUSION

For the reasons cited, the question of the lawfulness of the misrepresented rates, and of the other tariff provisions, should be referred to the Commission for it's determination, and this proceeding should be held in abeyance pending the determination of those issues by the Commission.

Respectfully submitted this 17th day of March, 1987.

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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC.; I.D.No.: 56-1299892	)	Case No. SH-B-86-00226
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR REFERRAL TO INTERSTATE COMMERCE COMMISSION

Langdon M. Cooper (Trustee) and Mark Associates of North Carolina, Inc. (Mark), Plaintiffs, make the following response in opposition to Defendant California Consolidated Enterprises, Inc.'s (CCE) Motion for Referral to the Interstate Commerce Commission:

1.
SUMMARY OF ARGUMENT

This case is a straight collection case involving the collection of freight charges pursuant to Carolina Motor Express, Inc.'s (Debtor) interstate motor common carrier tariffs filed with the Interstate Commerce Commission (ICC). The total sum sought to be collected is $82,853.73, plus prejudgment interest at 15% per annum and attorneys fees of 33%. The interest and attorney's fees are also assessed pursuant to the Debtor's ICC tariff.[1]

The special and/or technical expertise of the ICC is not necessary to determine CCE's indebtedness to Plaintiffs. All of the tariff provisions at issue are published and can be understood by a reader of average intelligence. (A copy of the appropriate tariff items are attached as Appendix A.) The correct rate to be charged is determined by multiplying the number of miles traveled by the truck times the rate expressed in cents per mile. Additional charges are assessed for each stop for pickup and/or delivery made by the truck exclusive of the first pickup and final delivery. Also an insurance surcharge of 3.5% has been added to certain bills to reflect the special rate increase filed by the Debtor with the ICC to cover the increased insurance costs experienced by the Debtor since June 1985. The corrected balance due freight bills furnished by Plaintiff as Exhibit A to the Complaint show

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[1] The principal amount prayed for in the Complaint contains $24,201.90 worth of freight bills which were original billings that remain outstanding, and $58,651.83 worth of balance due bills which were created as a result of Mark's audit of the Debtor's freight records.

the mileage, stop and insurance charges. The simple fact is that CCE has not paid the filed tariff rate on the balance due bills as it is obligated to do pursuant to 49 U.S.C. 10761(A) (historically referred to as the "filed rate doctrine"). Also, for no apparent reason, the Defendant has failed to pay the original freight bills attached as Exhibit B to the Complaint. Since payment of the tariff rate is mandated by law, and there is no doubt as to what is the proper rate, there is no need for referral to the ICC.

2.
STATEMENT OF THE FACTS

Following the Bankruptcy Court's approval of the audit contract, Mark audited the Debtor's freight bills to determine whether the Debtor's customers had paid the lawful rates published in the Debtor's tariffs filed with the ICC. Mark's audit concluded that certain of Debtor's customers had underpaid, that is, that certain customers had paid lower freight charges than those charges set forth in the applicable tariffs. The Defendant is such a customer. The defendant has failed to pay certain original billings as well.

The defendant is an ICC licensed property broker who was a major shipper/customer of the Debtor. By its own admission in its Answer, the Defendant was familiar with the Debtor's legal duty to charge, and the Defendant's legal duty to pay, the filed tariff rates. By its motion, Defendant now requests the Court to refer this case to the ICC under the doctrine of primary jurisdiction so that it can avoid paying those legal charges. The fact

show that such a referral is not necessary and will result only in delaying the collection of the involved charges.

Defendant alleges that the transportation services rendered by the Debtor were performed as a contract carrier and paid pursuant to a "contract" rate, rather than the filed tariff rate. (See Defendant's Second Defense). In the alternative, the Defendant alleges that the Debtor, while acting as a common carrier, "indicated" that certain rates would apply as stated in a "confirmation of rates sheet." (See Defendant's Third Defense.) By its Answer, Defendant admits that the transportation services set forth in the Complaint were furnished to Defendant by the Debtor. The Defendant also admits it failed to check with the ICC or obtain from the Debtor a copy of the filed rates to confirm the legal charges. The Defendant also failed to obtain a copy of the Debtor's alleged contract carriage authority. In fact, the letter attached as Exhibit A to Defendant's Answer does not refer to any contract authority and could not have enclosed a copy thereof since, at the time of the writing (November 21, 1984), the Debtor did not possess ICC contract carriage authority. (Attached hereto as Appendix B is a copy of the Debtor's contract carrier Permit which shows a service date of March 7, 1985.) More importantly the Defendant has failed to produce or even allege the existence of a bilateral contract. A written, executed, bilateral contract is mandatory in order for contract rates to apply. See 49 C.F.R. 1053.1 (Appendix C hereto).

Now, to avoid the assessment of the legal charges by the Trustee, the Defendant claims the collection of the balance due freight charges, set forth in the Complaint, would be an "unreasonable practice" under the Interstate

Commerce Act. In so doing, Defendant's Answer and Motion merely allege the same equitable defenses that have been repeatedly rejected by the courts (including numerous Supreme Court decisions) in favor of upholding the filed tariff as the *only* permissible charge.

3.
LAW AND ARGUMENT

The basis of the Trustee's opposition to Defendant's Motion for Referral to the ICC is that the ICC's technical expertise is not required under the facts of this case. The issue here is purely a question of law. That is, whether a shipper's claim that a carrier intentionally or mistakenly misquoted and applied a rate, inconsistent with a carrier's lawfully filed tariff with the ICC, presents a valid defense in an action at law to recover the legal tariff rate. This question has been consistently resolved by the courts in favor of the correct rate set out in the filed tariff.

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed in the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* (Emphasis supplied.)

In *Armor Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908), the Court announced the following rationale for this rigid rule:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates. See e.g., *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 553, 535 (1983) (carrier has absolute right to collect tariff charges on every shipment); *Southern Pacific Transportation Co. v. Commercial Metals Co.* 456 U.S. 336, 343-44 (1982) (equitable defense of carriers violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265, U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interest commerce); and *Louisville & R.R.R. v. Rice*, 247 U.S. 201, 202 (1918) (where the court stated that a carrier's claim is, of necessity, predicted on the tariff – not an understanding with the shipper.)

The U.S. Courts of Appeal have also consistently applied the "filed rate doctrine." See *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 778, F2d 1365, 1372 (9th Cir. 1985) (Penalty provision in a tariff which provides for charges ten times the normal rate upheld despite carrier's failure to reveal its existence to the shipper). (Appendix D hereto) *Louisville & N.R.R. v. Mead Johnson & Co.* 737 F.2d 683 (7th Cir. 1984) (misquotation of rate held not a bar to later recover of correct rate); *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363

(D.C. Cir 1980) (carrier awarded diffence [sic] between agreed upon "contract rates" and published rates); *Illinois Central Gulf Railroad Company v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied despite repeated assurances by carrier that they would not apply); *Nyad Motor Freight, Inc. v. W.T. Grant Co.*, 486 F.2d 1112, 1114 (2d Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); *Chicago V&R Co. v. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *Bower & Campbell v. Knox Glass, Inc.*, 390 F.2d 193, 196 (3d Cir. 1968); and *Norfolk & Western R. Co. v. American Comp. St. Corp.*, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of rates. *Consolidated Freightways Corp. v. Terry Tuck, Inc* 612 F.2d 465 (9th Cir. 1980) *cert. denied*, 447 U.S. 907 (1980) (counterclaim for fraud dismissed); *Missouri Pacific R. Co. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982) (ICC Act precludes shippers from asserting estoppel defense of detrimental reliance); *Paulson v. Greyhound Lines, Inc.*, 628 F. Supp 881 (D. Minn. 1986), aff'd. ___ F.2d ___, 1986 Fed Carr. (CCH) par. 83,287 (fraudulent guarantee of next day delivery not grounds for damages as next day service not contained in tariff). (5th Cir. 1986), (Appendix E. hereto).

When faced with eighty years of contrary judicial precedent, the Defendant is forced to rely upon *Ex Parte* No. MC-177 *National Industrial Transportation League – Petition to Initiate Rulemaking on Negotiated Motor Common Carrier Rates* (Served 10/22/86) (Appendix F hereto), in

an effort to establish equitable defenses to the requirements of 49 U.S.C. Section 10761(a). At the outset, it should be noted that this is a non-binding policy statement which is contrary to years of unbending judicial statutory construction. The policy statement is inconsistent with the statutory mandate of 49 U.S.C. 10761(a) and is without a reasonable basis in law. Thus, the policy statement is not entitled to deference by this Court. Cf. *SEC v. Sloan*, 436 U.S. 103, 1118-19 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

While agreeing to give its advisory opinion, the Commission readily admits that a referring court can ignore its findings and decide for itself what rate should apply. (*Ex Parte* No. MC-177, p.8). It is submitted that such deference to the courts in this matter is an admission by the Commission that it really has no right under law to order deviation from the filed rate and that Ex Parte No. MC-177 is merely an attempt to appease disappointed shippers who have requested that the Commission grant them relief from the filed rate doctrine – relief which the courts have universally refused to allow.

Eighty years of judicial precedent is disposited on the issue before this court. Elevating a shipper's quoted rate allegation to a cognizable defense sharply departs from the law enacted by Congress and consistently enforced by courts. The Commission's jurisdiction to grant relief from lawfully filed rates applicable to past shipments is circumscribed by the Interstate Commerce Act. See *Mammoth Plastics, Inc. v. National Classification Board*, 341 I.C.C. 15, 17, 18 (1972) (wherein the ICC recognizes that it has no jurisdiction to award reparations on past shipments). (Appendix G, hereto). Exclusive jurisdiction over actions

for motor carrier undercharges and actions for reparation is vested in the courts and not in the commission. 49 U.S.C. Sections 11705(a) and 11705(c)(2). When the alleged unreasonable practice involves a violation of a filed rate (not the reasonableness of the rate itself) the Courts and not the Commission have exclusive jurisdiction to determine and apply the proper charge. *I.C.C. v. J.B. Montgomery, Inc.*, 483 F. Supp. 279 (D Colo. 1980). (Appendix H, hereto), *Farley v. Santa Fe*, 778 F.2d at 1370-71.

In *J.B. Montgomery*, the ICC, on behalf of various shippers, sought restitution for past duplicate billings or overcharges, in addition to prospective injunctive relief. The defendants argued that the case should have been remanded to the ICC for agency proceedings on whether the defendants' practices were unreasonable and/or discriminatory. The Court rejected the defendant's attempt to refer the case to the ICC stating:

> in this case the primary issue is not the reasonableness of the rates as filed with the ICC, but whether the defendants have been operating in violation of those rates. While the former question clearly does involve the expertise of the ICC, the latter does not.

483 F.Supp. at 281.

In *Farley*, the plaintiff argues that Santa Fe's motion for summary judgment on the issue of the filed rate doctrine should have been stayed pending referral of the matter to the ICC contending that the tariff which required Farley to pay a penalty of ten times the normal rate for failure to comply with an audit was unreasonable as applied to the facts of its case. Farley did not argue

that the tariff provision was unreasonable on its face or that its language was not used in the ordinary sense. Rather, Farley sought referral based on the practice of applying the tariff in its particular case. The Ninth Circuit Court of Appeals rejected this argument finding that referral is not proper where the referring party admits the tariff is unambiguous and reasonable on its face. 778 F.2d at 1371.

In *Civil Aeronautics Board v. Modern Air Transport*, 179 F.2 [sic] 622 (2d Cir. 1950), the Court held that the doctrine of primary jurisdiction:

> . . . is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that the courts have original jurisdiction to interpret tariffs, rules and *practices* where the issue is one of violation, rather than reasonableness. (Emphasis supplied.)

The case before this Court is the same type of case that the District Court in *J.B. Montgomery* and the Circuit Court in *Farley* refused to refer to the ICC. The only difference being that in *J.B. Montgomery*, the carrier had charged in excess of its published tariff rate and the ICC was seeking restitution on behalf of the shippers who had paid too much, and in *Farley* a penalty provision was enforced rather than the base tariff rate. In this case, the Debtor charged below its filed tariff and the Trustee is merely seeking to have the Defendant pay the appropriate published tariff charges plus attorneys fees and interest to the estate. In all three cases, the issue is one of

violation of the published tariff charge, not the reasonableness of the rate. The case law is clear that when it comes to the practice of violating a published tariff rate, referral to the ICC is improper. In *Re Silverwheel Freight Lines, Inc.*, (1986, B.C.D. Or) ___ B.R. ___, Case No. 382-03538-S7, Adversary Proceeding No. 85-0743-S (Appendix I, hereto).

Although federal regulation of motor carriers was changed by the Motor Carrier Act of 1980, P.L. 96-296, July 1, 1980, the 1980 Act did not change the strict requirements of 49 U.S.C. Section 10761(a). This was recently made clear by the Supreme Court in *Square D Co. v. Niagra Frontier Tariff Bureau*, ___ U.S. ___, 106 S.Ct. 1922 (1986) and in *R.C.C.C. v. U.S.*, 793 F.2d 376 (D.C. Cir. 1986).

In *Square D*, the Supreme Court revisited the filed rate doctrine in an anti-trust context. It concluded that the 1980 Motor Carrier Act did not alter the statutory requirement. In that case, the court said:

> The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by contract or tort of the carrier

Square D v. Niagra, ___ U.S. ___, 106 S. Ct. at 1927-28, n. 23.

In *R.C.C.C.*, the D.C. Circuit found the ICC without statutory authority to waive the requirements of 49 U.S.C. Section 10761(a), stating:

> That requirement (for a rate to be contained in a tariff) is utterly essential to the Act. Without it, for example it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, *see* 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. Sections 10708 (a)(1) & 11701(a).

In *R.C.C.C.* the D.C. Circuit determined that the changes brought about by the 1980 Act did not give the ICC authority to waive the tariff filing adherence requirements for motor carriers mandated by 49 U.S.C. Section 10761(a). Thus the commission's assertion in Ex Parte No. MC-177 that the Motor Carrier Act of 1980 somehow created an "environment" in which equitable defenses to a filed rate may be allowed is simply wrong.

4.
CONCLUSION

For the reasons set forth above, Defendant's Motion for Referral to the Interstate Commerce Commission should be denied.

The applicable statutes and case law actively demonstrate that the instant case is to be determined by the resolution of a question of law. Referral to the ICC for the purpose of determining the validity of CCE's negotiated rate defense, under the facts herein will serve no purpose other than to delay this case. CCE was aware of the legal requirement to pay the Debtor's published tariff charges at the time CCE tendered freight to the Debtor. The

defendant should not now be allowed to further and unreasonably delay these proceedings through a referral to the ICC which has no basis in law or fact.

Respectfully submitted this 9th day of March, 1987.

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(Appendix Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D. No.: 56-1299892	)	Case No. SH-B-86-00226
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498

PLAINTIFFS' REPLY TO DEFENDANT'S MEMORANDUM OF LAW FILED IN SUPPORT OF DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Langdon M. Cooper (Trustee) and Mark & Associates of North Carolina, Inc. (Mark), Plaintiffs, make the following reply to Defendant, California Consolidated Enterprises, Inc.'s (CCE), Memorandum in Support of a Motion for Referral to the Interstate Commerce Commission:

DEFENDANT'S RELIANCE UPON SEABOARD SYSTEMS IS MISPLACED AS SEABOARD SYSTEMS DID NOT DEAL WITH A NEGOTIATED, BUT UNFILED RATE CASE

A comparison of the facts in the instant case with the facts contained in *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), highlights the reasons that this case should not be referred to the Interstate Commerce Commission.

In *Seaboard*, a railroad sued to collect undercharges based upon a higher single car rate from a shipper which was promised and billed by the railroad a lower multi-car rate. Both rates were filed with the ICC, but only the higher rate applied to the carrier. The two rates were listed adjacent to each other in the carrier's filed tariff. The action was stayed pending an ICC determination of the reasonableness of enforcing the higher filed rate. The ICC concluded that even though the higher rate was not technically ambiguous, it had, "lent itself to misinterpretation by the ordinary user (here the shipper) and the shipper relied on (the railroads') continued misquotations and misbillings, to the shipper's substantial detriment." *Seaboard* 794 F2d at 637.

The Eleventh Circuit in upholding the Commission's decision to apply the lower filed rate over the higher filed rate, found that it was not contrary to the Interstate Commerce Act and within the ICC's authority to inquire into the unreasonableness of the freight undercharge collection under the "circumstances presented." These circumstances were as follows:

> The Commission found that the publication of a tariff whose meaning is not plain to the ordinary

> user, combined with misquotation of the applicable rate under that tariff and a shipper's reliance on the misquotation to its detriment, constitute circumstances under which the Commission may find that the collection of undercharges would be an unreasonable practice. The Commission emphasized that there *must* be difficulty in interpreting the tariff such that the shipper reasonably relied on the carrier's interpretation and did so to its detriment . . . If the tariff was ambiguous and subject to two interpretations, the case is even stronger to support the Commission's decision. (Emphasis added).

The test set forth in *Seaboard* is not met in the instant case. First, there was no difficulty in interpreting the Debtor's tariff. Second, CCE did not rely upon the Debtor's interpretation of the tariff since no tariff was ever provided to CCE. Third, the Debtor's tariff was not ambiguous and subject to two interpretations. Finally, as indicated in the Plaintiffs' initial Opposition to Defendant's Motion to Referral, CCE as a licensed ICC broker is a sophisticated shipper who cannot plead ignorance of the tariff filing requirements of the Interstate Commerce Act. Had CCE took the responsibility to determine what the applicable tariff rate was, it would not be in court today.

Finally, the Court's attention is directed to a recent decision by the Wisconsin Court of Appeals in G.M.W., *Inc. v. Certified Parts Corporation*, ___ N.W.2d ___, 1987 Fed. Carr. (CCH) Para. 83,302 (Wic. Ct. App. 1986), (Appendix "A" hereto), where the Court held that the long standing doctrine that equitable defenses were not available to shippers faced with undercharge collections

action brought by common carriers was not over ruled by statutory changes such as the Motor Carrier Act of 1980, court opinions such as the *Seaboard* case and ICC orders such as Ex Parte No. MC-177.

In response to the concurring Judge's opinion which appeared to give the Defendant the hope of avoiding the imposition of the filed rate doctrine by referral to the ICC, the majority concluded:

> The concurrence would adopt a broad rule permitting courts, in concert with the ICC, to circumvent an act of Congress. Courts are not free to do this. The ICC as it recognizes, is also not free to do this. *Wilson* addresses the significant reasons why Congress adopted the "filed tariff" doctrine, and holds that under the unique facts of that case, the ICC could find part of a tariff unreasonable, and therefore unenforceable. It is another matter all together to suggest that any tariff can be an "unreasonable practice." Such a suggestion raises questions of separation of powers, an issue not raised or argued here.

G.M.W., Inc., ___ N.W.2d ___ at ___, 1987 Fed. Carr. Cases Para. 83,302, Page 58,342.

CONCLUSION

For the reasons set forth above, and in the Plaintiffs' previously filed Opposition to Defendant's Motion to Referral, Plaintiffs respectfully request this Court to deny Defendant's Motion for Referral to the Interstate Commerce Commission.

This the 20th day of March, 1987.

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July 26, 1990

John M. Greacen, Clerk *VIA FEDERAL EXPRESS*
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for the Fourth Circuit
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Richmond, Virginia 23219

Re: Langdon M. Cooper, Trustee in Bankruptcy for
Carolina Motor Express, Inc., et al.
v. Delaware Valley Shippers
v. Peter C. Reiter
v. California Consolidated Enterprises, Inc.
Docket Nos. 89-3259, 89-3261, 89-3262

Dear Mr. Greacen:

Pursuant to your letter of July 16, 1990, the following are appellants' comments on the effects of *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 58 U.S.L.W. 4862, ___ U.S. ___ (1990) on the above-entitled appeals.

As indicated by Appellants' main brief, these are consolidated appeals from judgments of the District Court for the Western District of North Carolina. In *Delaware Valley* the District Court granted summary judgment to Appellee and denied summary judgment to Appellants

based entirely on the defense that Appellants' action in seeking motor carrier undercharges constituted an unreasonable carrier practice under 49 U.S.C. Section 10701. The District Court first referred *Delaware Valley* to the Interstate Commerce Commission ("ICC") and then adopted the ICC's finding of an unreasonable carrier practice and dismissed the action.

In *California Consolidated* and *Peter C. Reiter*, the District Court reversed the final judgments of the Bankruptcy Court and referred these matters to the ICC based on the determination that the appellees' sole defense, that of unreasonable carrier practices, required referral to the ICC. The Bankruptcy Court in entering judgment for appellants had rejected the unreasonable practice defense as contrary to the "filed rate doctrine" as codified at 49 U.S.C. Section 10761(a).

It is important to note that the District Court based its decisions in all three cases upon the alleged primary jurisdiction of the ICC to consider whether it would be an unreasonable carrier practice for the shippers involved to be required to pay Appellants' undercharge claims when they had previously negotiated lower unfiled rates. (See Joint Appendix at 8, 17, 18, 21, 22, 32, 35, 43-47).

In contrast, the Bankruptcy Court in *California Consolidated* and *Peter C. Reiter* rejected the ICC's "negotiated rates" unreasonable practice jurisdiction and affirmed the filed rate doctrine, stating:

> [T]he Court must, without regard to what its opinion is as to what the law should be, rule with regard to what the law is. And that is, that the "filed rate" doctrine is still the law of the land, and that, without regard to the ingeniousness of the defenses, the Court cannot allow them as they are not allowed by law.

(Joint Appendix at 73).

Maislin Industries firmly supports the legal conclusions reached by the Bankruptcy Court and rejects the line of cases relied upon by the District Court. Accordingly, *Maislin Industries* requires reversal of the District Court in these matters.

In language that parallels that used by the Bankruptcy Court, the Supreme Court in *Maislin Industries* stated:

> Labeling the carrier's conduct an "unreasonable practice" cannot disguise the fact that the ICC is justifying deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate. Stripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the Commission's interpretation of "unreasonable practices" thus stands revealed as flatly inconsistent with the statutory scheme as a whole [citations omitted] and §§ 10761 and 10762 in particular.

Maj. slip op. at 13-14.

The Supreme Court in *Maislin Industries* further rejected the ICC's and the Appellees' argument, "that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate." Maj. slip op. at 11. Instead, the Supreme Court pointedly stated:

> We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule . . . Negotiated Rates policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

Maj. slip op. at 11, 12.

Maislin Industries, makes it clear that the *only* defense to the collection of a common carrier's filed rates is a challenge to the reasonableness of the rates themselves. However, in *California Consolidated* and *Peter C. Reiter,* the Appellees failed to present any evidence or legal argument before the Bankruptcy Court concerning the rates reasonableness issue left unanswered by the *Maislin Industries* case (See Maj. slip op. at 11, n. 10). Thus reversal and reinstatement of the Bankruptcy Court's judgment is necessary.

In *Delaware Valley* Appellants assume Appellee will argue that it somehow is entitled to raise the issue of rate reasonableness upon remand. A close examination of the record in this proceeding, however, reveals that any request by Delaware Valley that its case be remanded for further proceedings concerning the issue of rate reasonableness is misplaced.

On December 22, 1987, the District Court granted Delaware Valley's Motion to Stay the Action for Referral to the ICC. (See Joint Appendix Pages 77-78). The District Court thus provided the Defendant with the opportunity to raise all of its defenses at the ICC. These defenses included the allegation concerning rate reasonableness.

On January 11, 1988, Delaware Valley filed its petition with the ICC based upon the naked allegation that the rates and practices of Carolina Motor Express were unreasonable. However, when Delaware Valley presented its evidence to the Commission, its allegation concerning rate reasonableness was limited to unsupported arguments that the tariff rates were unreasonable to the extent they exceeded the unfiled, quoted rates. This is another way of saying that the quoted rates are the applicable rates, the conclusion struck down in *Maislin Industries.*

The ICC in rendering its opinion in *Delaware Valley,* upon which the District Court based its order of dismissal, makes no mention of any rate reasonableness finding. (See Joint Appendix 79-81, attached hereto is a copy of the full opinion, as pages 2 and 4 of the opinion were inadvertently not attached to the Appendix). Suffice it to say, Delaware Valley made no showing before the ICC even remotely approaching the reasonableness standard set forth in 49 U.S.C. Section 10701(e). Instead, Delaware Valley pled its case at the ICC based purely on negotiated rates being an unreasonable practice.

If Delaware Valley had any objection to the ICC's failure to address its allegations of rate reasonableness, it should have petitioned the ICC for administrative review of the September 9, 1988 decision. This petition would have been due twenty days after the ICC's decision was served. See 49 C.F.R. Section 1115.3. Alternatively, Appellant could have appealed the ICC's failure to reach the question of rate reasonableness to the District Court within 90 days after the ICC's findings were reported pursuant to 28 U.S.C. Section 1336(c). Because Delaware

Valley failed to seek any review of the ICC's order, Delaware Valley is now jurisdictionally barred from raising these issues on appeal and seeking a *de novo* review.

With the case law now settled concerning Appellees' "unreasonable practice" defenses and with California Consolidated and Peter C. Reiter having never alleged rate unreasonableness, and with Delaware Valley having waived any claim that Carolina Motor's tariffs were unreasonable, it is respectfully suggested that *Maislin Industries* mandates reversal of the District Court's decision in these three cases. Appellants, further request that in *California Consolidated* and *Peter C. Reiter,* this Court issue instructions to the District Court to reinstate the Bankruptcy Court's judgment and rule on Appellants' request for interest and attorney's fees. This Court should also issue instructions to the District Court in *Delaware Valley* to grant Appellants' Motion for Summary Judgment.

Respectfully submitted,

/s/ Joseph L. Steinfeld, Jr.
Joseph L. Steinfeld, Jr.

JLS/gfm (7-25-11.jls)

Enclosure

cc: Langdon M. Cooper, Esquire
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July 28, 1990

Express Mail

John M. Greacen Clerk
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Re: 89-3261 Cooper, et al. v. Reiter CA-88-138-SH-C
89-3262 Cooper, et al. v. California Cons. CA-88-139-SH-C

Dear Mr. Graecen:

This letter is in response to your letter of July 16, 1990, asking for counsels' views on the above entitled cases, considering the recent Supreme Court decision in *Maislin Industries v. Primary Steel, Inc.*, No. 89-624 (June 21, 1990)

In these two cases, this counsel believes that referral of the matter to the Interstate Commerce Commission is not only appropriate, but is now mandatory under *Maislin, supra.*

From the inception of this proceeding, the defendants have alleged that (1) the rates Plaintiffs seek to collect are unreasonable and unlawful in violation of 49 U.S.C.A. Section 10701(a); (2) the tariff sections containing the rates Plaintiffs seek to apply to the shipments in question are not the applicable sections of said tariffs, and if applied to the shipments in question, would violate 49 U.S.C.A. Section 10761 and 10762; and (3) allowing the collection of the tariff rates after lower rates have been negotiated and agreed upon by both parties is an unreasonable practice in violation of 49 U.S.C.A. 10701 (a).

In oral argument before the Court, this counsel argued that:

(1) A filed rate is admittedly a legal rate,

(2) but a legal rate, when challenged, must be shown to be reasonable.

(3) Only is a rate is shown to be reasonable, is it a lawful rate.

(4) Only if it is a lawful rate, can a carrier's suit to collect it be enforced, and

(5) the only entity that can determine whether a rate is reasonable is the Interstate Commerce Commission.

Therefore, when the reasonableness of a rate is challenged, the matter must be referred to the Commission.

This counsel made the same argument before the United States Court of Appeals for the First Circuit in *Delta Traffic Service, Inc v. Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990), and the Court there, before *Maislin*, referred the matter to the Commission for (A) a

determination as to the reasonableness of the rates, and (B) a determination of the reasonableness of the practices.

The First Circuit stayed the mandate on this decision until the decision in *Maislin* was entered, but, two weeks ago, on July 19, 1990, the Court entered it mandate and ordered the District Court to refer the matter to the I.C.C. on section "A" of its decision, that which referred to the reasonableness of the rates. (Copy attached)

In these cases, Judge Woodrow Wilson Jones, had referred the cases to the I.C.C. on the unreasonable practices issue, and the Commission entered orders on March 7, 1990 (Reiter) and March 13, 1990 (California Consolidated), finding the common carrier's *practices* unreasonable, but making no decision as to the reasonableness of the rates. The matter should therefore be referred back to the District Court for a referral to the I.C.C. for a decision on the reasonableness of the rate.

This would create a uniformity in treatment between the Circuit Courts.

Very truly yours,

Robert J. Gallagher
Attorney for:
California Consolidated
Enterprises, Inc.
and
Peter C. Reiter

RJG/mg
Enclosures